

A Whiff of Thuggery

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Maximilian Steinbeis Sa 17 Mrz 2018

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Dear Friends of Verfassungsblog,

In Martin Scorsese's 1990 film "GoodFellas" there is a famous scene in which Tommy (Joe Pesci) entertains a round of friends in a bar. Roaring laughter accompanies his hilarious stories, most of all by his friend Henry (Ray Liotta). But when Henry mumbles obliviously *that's funny...*, Tommy all of a sudden gets serious. *What do you mean, funny?*, he asks. Henry stutters: *Funny, like... you're a funny guy.* Tommy: *Funny like, what? Funny like a clown? I make you laugh? I'm here to fuckin' amuse you?* Henry falls silent, and with him the whole place. Two or three agonizingly quiet seconds pass.

Then he gets it. *Get the fuck outa here!* It was all a joke. The laughter afterwards is twice as loud as before. But no one who has seen this scene will ever forget the icy horror of those two or three silent seconds when Henry believes his friend Tommy would first make him laugh and then kill him for that very reason.

The Russian reaction to the assassination attempt in Salisbury made me think of that scene. A nerve agent developed in Soviet army laboratories was used to poison a former Russian spy right in the middle of England. There is something Tommy-ish about the gesture of indignation with which the Russian Government rejected all responsibility for this case, as if it were an act of aggression to even come up with this idea. While at the same time the signal "nerve agent" is sent out with unmistakable clarity to anyone who imagines himself safe from Russia's revenge in the UK or wherever in the world...

(But what if Russia is really absolutely innocent? *Get the fuck outa here!*)

This week, the Polish government published a "White Paper" to justify its so-called "judicial reform". Reading the document (quote: "*There is a general sense that the courts are dominated by the ,cult of formalism'*"), it is hard to believe that it was written with the goal to actually convince anyone.

Here is what Polish judges and lawyers have to say about the situation...

... and here is a brief reminder of why judicial independence is so important:

Poland's Prime Minister Mateusz Morawiecki brought that "White Paper" to his meeting with Jean-Claude Juncker, the President of the EU Commission which proposes to the member states to declare that the subjugation of the independent judiciary in Poland poses "a clear risk of a serious breach" of the rule of law principle in the EU according to Article 7(1) TEU. However, the hope to get the 22 votes in the Council required for this declaration is waning rather quickly. After Hungary, the three Baltic states have announced this week their will to vote against the Commission's proposal. Croatia? Czech Republic? Bulgaria? Romania? Malta? Two of these are enough, and the Article 7 procedure is dead in the water before it has even started.

But that doesn't necessarily mean that all is lost. There still are other ways to save the Union. During the last days and weeks, the European Court of Justice has taken some enormous steps that have the potential to radically change the EU's constitution. One was the judgement on the pensions of Portuguese judges, inconspicuous at first sight, which MICHAL OVÁDEK brought to our notice last week: In that decision, Luxembourg declared itself competent for assessing the independence of member state judges in whose hands the application and interpretation of EU law lies. This means that the CJEU can and will examine whether the Polish judiciary is in fact independent (Art. 19 TEU, Art. 47 CFR) or not. The Polish government won't get out of this by just presenting a measly "White Paper".

+++++++ A Note from EUI/WZB/LSE ++++++

*The European University Institute, the WZB Berlin Social Science Center, and the London School of Economics and Political Science invite submissions for the second annual **European Junior Faculty Forum for Public Law and Jurisprudence** to be held at the European University Institute in Florence on July 12-13, 2018.*

The EJFF intends to address public law scholarship from a theoretically informed doctrinal, interdisciplinary and comparative perspective, contribute to the research of junior scholars, and create an intellectual community of European public law scholars. Public Law focused scholarship from other disciplines (philosophy, political science, history, sociology) is explicitly welcome.

The forum brings together a selected group of early career scholars for what promises to be an intellectually rewarding academic exchange. Interested scholars must be based in an academic institution in the European Union or in an Associated Country (see the Call for Papers for details) and have obtained the doctoral degree no longer than seven years prior to the application deadline. The papers, selected based upon blind peer-review, will be commented on by two senior scholars.

The complete Call for Papers for the 2018 European Junior Faculty Forum for Public Law and Jurisprudence is available here: www.wzb.eu/ejff

The deadline for submissions is May 1, 2018. Decisions will be sent by May 31, 2018.

Questions about the European Junior Faculty Forum for Public Law and Jurisprudence as well as submissions should be sent to ejff@wzb.eu.

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Another step was initiated in Dublin, not in Luxembourg. Aileen Donnelly, a judge of the Irish High Court, had to decide about the extradition of a man wanted by Poland with an EU arrest warrant for drug trafficking, but before doing so she referred the case to the CJEU, asking whether "the High Court, as an executing judicial authority (of the arrest warrant), ha(s) to revert to the issuing judicial authority for any further necessary information about the trial that this requested person will face, where the High Court has found that there is a systemic breach to the rule of law in Poland?" In other words, does Judge Donnelly still have to trust in the independence of the Polish judiciary under EU law, even if the independence of the Polish judiciary can no longer be trusted?

The Polish ruling party PiS was quick to realise how bad news that case is for them. PiS politicians immediately set out to portray the verdict from Ireland as absurd and totally insane. (“To what extent does changing the retirement age of judges or their appointment affect the risk of death or inhumane treatment resulting from a European arrest warrant? Does differentiating the retirement age of judges (women and men) affect the fundamental rights of drug mafia criminals?”, asked Deputy Minister of Justice Marcin Warchol). Others tried to personally discredit Judge Donnelly, throwing mud at her qualification and her sexual orientation and going out of their way to create the impression that this was all just another liberal conspiracy. Tommy and Henry would have found a lot to be amused about.

What Constitutional Courts do

MATTIAS WENDEL shows how the referral decision from Ireland – or rather, the disintegration of the rule of law in **Poland** that brought it about – might turn the whole architecture of the EU as a legal community upside down: “The great merit of the decision of the Irish High Court is to bring together the question of the rule of law crisis and the principle of mutual trust. There is much to suggest that the Irish referral proves to be the beginning of the end of the horizontal confidence of EU Member States in the integrity of the Polish rule of law that has been presumed to date. It was high time” (German).

MACIEJ TABOROWSKI is carrying out a thorough analysis of the possibilities opened up by last week’s *Associação Sindical* judgment of the European Court of Justice in the case of **Poland**.

In **Italy**, the Constitutional Court has further clarified its – until recently rather strained – relationship with the European Court of Justice. The outcome is explained by PIETRO FARAGUNA.

Switzerland was the object of a judgment from Strasbourg after a refugee, who had been severely tortured in Tunisia and had found asylum in Switzerland, had sued for not allowing him to take legal action for damages against the state that had done him such injustice. The ECHR did not dare to agree with the victim of torture. BARBARA VON RÜTTE reports (German).

In **Germany**, the legal topic of the week was certainly the decision of the Federal Court of Justice that a savings bank may continue to use the generic masculine in its forms and address every *Kundin* as a *Kunde*. KATHARINA MANGOLD takes a decidedly different view (German).

ANDREAS FISCHER-LESCANO is incensed by the fact that the leading legal publishing house of **Germany** C.H.Beck still insists in naming its best-selling Civil Code commentary “Palandt”, regardless of all evidence about the Nazi involvement of the historical Otto Palandt (German).

The **German** Bundestag is currently discussing what to do about the criminal law ban on advertising abortion – a matter with constitutional arguments both for and against it, which are gathered by PAULA FISCHER and HENRIKE VON SCHELIHA (German).

Lebanon is used to much political grief, but the way its Prime Minister Saad Hariri has been jerked around by his supposed ally Saudi Arabia in its fight against Iran for regional hegemony in the Middle East was unheard of even for Lebanese standards. JAMAL EL-ZEIN describes what has happened.

Speaking of gangsters: The President of the **Philippines**, Rodrigo Duterte, has announced the withdrawal of this country from the International Criminal Court. LASSE SCHULDT puts that case in its Southeast Asian context.

Duterte is one of those whom **US** President Trump is known to admire. CHRISTIAN TIETJE and VINZENZ SACHER investigate Trump's intention to wage a trade war and warn the EU to not let themselves being provoked to break the law (German).

Elsewhere

JAN MORAWITZ-BARDENHEUER dismantles the myth spread by the **German** far-right AfD party that Chancellor Merkel has committed a criminal offence for "human trafficking" and asks about the limits of freedom of expression.

MARKUS THIEL shakes his head over two motions of the AfD parliamentary group in the **German Bundestag** to increase the federal competences in the fight against terrorism.

LAURENT PECH and SÉBASTIEN PLATON provide another detailed and very recommendable analysis of the epochal *Associação Sindical* ruling of the CJEU.

The equally important *Achmea* ruling of the CJEU on arbitration and trade agreements continues to fuel a lively discussion: CHRISTINA ECKES finds that the member states can no longer actually ratify CETA. ANDREJ LANG criticises the Court for overly prioritizing the autonomy of European law. PEKKA NIEMELÄ believes that the CJEU overestimates the risk of arbitration.

WOJCIECH SADURSKI describes the wave of embarrassment that has swept over **Poland** after the controversial Holocaust law was passed.

MARK WESSEL investigates whether the British government is rightly accusing **Russia** of "use of force" in the dispute over the attempted murder in Salisbury. MARKO MILANOVIC deplores the absence of the human rights dimension in the debate.

STEFAN COLLIGNON sees the trenches of the 17th century **English** civil war shining through the Brexit landscape.

MIGUEL ÁNGEL PRESNO DE LINERA is not at all surprised that **Spain** was convicted by the ECHR for punishing two Catalan demonstrators for burning photos of the Spanish king.

INGRIDA MILKAITE analyses a judgment of the European Court of Human Rights against **Lithuania**, which banned the use of Jesus and Mary for jeans and clothing advertising.

DOMINIK KRELL reports how the law in **Saudi Arabia** is changing under the influence of the reformist Crown Prince Muhammad bin Salman.

SERGIO VERDUGO and JORGE CONTESSE highlight the failure of constitutional reform

in **Chile** and its consequences for constitutional renewal.

Next week the ECtHR will pronounce its verdict in the *Alpay/Altan v. Turkey* case, two journalists held in pre-trial detention for doing their job and despite a ruling by the Turkish Constitutional Court declaring their detention unconstitutional. Şahin Alpay has now been released from prison following a second ruling by the Constitutional Court and is now under house arrest. Last week I discussed how much is at stake for both Turkish human rights holders and the Strasbourg Court itself. We will cover that story.

I'll also have the privilege next week of presenting and discussing the *Verfassungsblog* project at the European University Institute in Florence. I am very much looking forward to that opportunity and, to be honest, hope for a slightly less eventful week than the last ones. I have rented myself a scooter to chatter up and down the hills on my way to Badia Fiesolana and back in the balmy Tuscan spring, and I'd rather like to some time to use it! In the meantime, a successful week to you, all the best, and take care!

Max Steinbeis

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